Supreme Court, U.S.
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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

AMERICAN LIFE LEAGUE INC., *et al*

Petitioners,

v.

JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Congress have the constitutional authority under the Commerce Clause, Section 5 of the Fourteenth Amendment and the Tenth Amendment to enact the Freedom of Access to Clinical Entrances Act of 1994 ("FACE"), 18 U.S.C. § 248, which, *inter alia,* makes criminal, and subject to civil damages, even the nonviolent physical obstruction of entrances to reproductive health services?

2. Did Congress in enacting FACE abridge the freedom of expression protected by the First Amendment by creating content- and viewpoint-based restrictions upon political expression?

3. Did Congress in enacting FACE violate Petitioners' rights under the First Amendment Free Exercise Clause and the terms of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, *et seq.*?

PARTIES TO THE PROCEEDINGS

There is no parent or subsidiary company to be listed with respect to Petitioner American Life League, Inc. ("ALL"). Rule 29.1.

Petitioner ALL is a District of Columbia corporation, incorporated in 1981, with its office in Stafford, Virginia; recognized under 26 U.S.C. § 501(c)(3) as tax-exempt, with some 300 thousand donors.

Petitioners Antoinette C. Cleary, David G. P. Englefield, Patricia Lohman, Patricia Savino and (the Reverend Father) Gerald Weymes are individual U. S. citizens.

Respondent Janet Reno is Attorney General of the United States, as such charged with enforcement of FACE; and is sued in her official capacity.

The District Court allowed five defending intervenors: the National Abortion Federation; the National Organization for Women; Commonwealth Women's Clinic and Capitol Women's Center; and Dr. George Tiller and Dr. Susan Wickland. The District Court also accepted, as did the Fourth Circuit, an *amicus* brief from the American Civil Liberties Union and the ACLU Foundation of Virginia.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

AMERICAN LIFE LEAGUE, INC., et al.

Petitioners,

v.

JANET RENO,
Attorney General of the United States

Respondent.

The American Life League, Inc., ("ALL"), Antoinette C. Cleary, David G. P. Englefield, Patricia Lohman, Patricia Savino and the Reverend Father Gerald Weymes respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 47 F.3d 642 (4th Cir. 1995). Appendix, at 1. The opinion of the United States District Court is reported at 855 F. Supp. 137 (E.D. Va. 1994). App. at 25a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and Petitioners seek review of the Fourth Circuit's judgment entered on February 13, 1995.

STATUTORY PROVISION INVOLVED

This case presents Commerce Clause and First Amendment violations.

Petitioners sued to have FACE declared facially unconstitutional.

STATEMENT OF THE CASE

This case presents Commerce Clause and First Amendment issues.

Petitioners sued Janet Reno, Attorney General of the United States, in her representative capacity, in the United States District Court for the Eastern District of Virginia on May 26, 1994, the day President Clinton signed FACE into law, invoking jurisdiction under 28 U.S.C. §§ 1331 and 1346(a)(2), seeking declaratory and injunctive relief arising under the Constitution, Article I, First and Fifth Amendments, and declaratory relief under 28 U.S.C. § 2201. Petitioners sought (1) class certification; (2) a declaration that FACE is null and void as violative of the Constitution; (3) a declaration that FACE is null and void as violative of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, *et seq.* ("Religious Act"); and (4) preliminary and permanent injunctions against enforcement of FACE.

Petitioner ALL researches; publishes a magazine, newsletters, brochures and other material relating to the human rights of persons born and unborn; has televised a program called *Celebrate Life!*; sponsors, and participates in, symposia and other public and invitational means of discussion and education; monitors, and reports upon, state and federal administrative, legislative and judicial developments; and otherwise seeks to fulfill its corporate mandate and the concerns of its donors. ALL has professional and volunteer staff.

Individual Petitioners and donors to ALL nonviolently have demonstrated, prayed and/or sidewalk-counseled in the proximity of an abortion clinic, often in company of other individuals similarly peaceably behaving. They do not anticipate, approve, condone, have prior knowledge of or ratify, nonpeaceable or violent conduct. In the aggregate, their action at times has constituted, and in the future will constitute, in the words of FACE, a "physical obstruction" (that is, temporarily rendering impassable ingress to an abortion facility). In the course of their peaceful pursuit, in the words of FACE, they (1) "interfere" (that is, restrict local freedom of movement [but only by virtue of proximity to a pregnant mother]); and/or (2) "intimidate" (that is, create a reasonable - but unfounded - apprehension of bodily harm); and/or (3) "injure" (that is, cause, e.g., monetary loss to an abortion facility; and/or emotional concern of a pregnant mother considering abortion; and/or psychological reaction of the mother; and/or familial reaction).

Absent enforcement of FACE, they peaceably would continue these local and noncommercial speech manifestations. As long as FACE is enforceable, they are in fear and jeopardy in so doing. As a result of exercising constitutionally protected

activities, ALL has been sued, in both federal and state court, by abortion-providers. No plaintiff ever has obtained a final judgment against ALL and ALL has settled no case.

Individual Petitioners are persons opposed to abortion upon theological, moral and other grounds; who have demonstrated, prayed and/or sidewalk-counseled within the vicinity of abortion clinics; and whose views, religion and activities, absent a FACE-induced chill, fall within the range of ALL-donor activities enumerated in the preceding paragraph.

On June 1, 1994, the Attorney General filed a F. R. Civ. P. 12 (b)(6) motion to dismiss. The District Court heard oral argument on June 10, 1994, and issued an opinion and order on June 16, 1994, dismissing the Second Amended Complaint with prejudice.

On February 13, 1995, the Court of Appeals for the Fourth Circuit affirmed.

FACE is a criminal statute that provides for both criminal and civil penalties against anyone who:

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; . . . or
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so,

> because such facility provides reproductive health services . . . .
>
> 18 U.S.C. § 248(a).

FACE defines its key terms in § 248(c); in § 248(d) it also provides a rule of construction that nothing in the Act shall be construed "(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution."

The criminal penalties in § 248 (b) vary with the nature of the crime. For a first offense involving only a nonviolent physical obstruction, the penalty is imprisonment for not more than six months or a fine of not more than $10,000. Civil remedies, § 248(c), include injunctive relief, compensatory or statutory damages ($5,000 per violation), punitive damages and costs and fees. Anyone injured in providing or obtaining services at a reproductive health facility is entitled to file a civil action under this provision. The Attorney General of the United States and any State Attorney General are also permitted to bring certain civil actions.

The Court of Appeals summarily rejected Petitioners' contention that Congress lacked the power under the Commerce Clause, §5 of the Fourteenth Amendment and the Tenth Amendment to enact FACE, relying entirely upon *Hodel v. Virginia Surface Mining & Recl. Ass'n,* 452 U.S. 264 (1981); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964); and *Katzenbach v. McClury,* 379 U.S. 254 (1964). The Court was silent about *United States v. Lopez,* 2 F.3d 1342 (5th Cir. 1993), and Petitioners' *Lopez* arguments. The Court did not distinguish between "affecting" and "substantially

affecting" interstate commerce but held "affecting" to be a sufficient nexus. According to the Court, Congress reached a rational conclusion in finding that violence, threats and physical obstruction affect interstate commerce. Similarly, Congress adopted regulatory means that were reasonable given the permissible ends it had in mind to deter violence. Finally, in response to Petitioners' claim that FACE jeopardized federalism, the Court said that Congress, not the courts, decides whether new laws are needed.

The Court holds that the conduct enjoined by FACE is not First Amendment-protected speech. The Court stated that it would not apply a strict-scrutiny test, as Petitioners advocated, because FACE is content- and viewpoint-neutral, thus requiring an intermediate-scrutiny test. In the words of the Court, "a statute regulating expressive conduct is neutral if it is justified without reference to the content of the violator's message or point of view," citing *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2523-24 (1994) and *Ward v. Rock Against Racism*, 491 U.S. 788, 791 (1989). App. at 9a-10a. In short, congressional purpose controls. Where a statute may regulate conduct that contains protected speech elements, the Court continues, a court must use the intermediate scrutiny test that was first described by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367 (1968).

The Court then rejected Petitioners' arguments that FACE is overly broad and vague and that under *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), a party may recover only actual damages by saying it knows of no rule that limits recovery when unprotected expression is involved. The Court concludes that neither the Free Exercise Clause nor the Religious Act requires striking FACE as unconstitutional.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

The Fourth Circuit decision conflicts with recently decided *United States v. Lopez* because FACE (1) exceeds Commerce Clause congressional power; (2) expands federal criminal jurisdiction beyond the power of Congress; and (3) intrudes upon federalism unjustified by § 5 of the Fourteenth Amendment. The decision also conflicts with First Amendment jurisprudence. This case is a timely and rare opportunity to provide guidance for the Judiciary which will be dealing with FACE questions arising from at least seventeen cases, with the high probability that many more cases will ensue. Meantime, unnumbered thousands of law-abiding prolife citizens are chilled from exercising their First Amendment rights by the omnipresent threat of a macedonian phalanx of federal forces ready to usurp traditional local police power.

I. FACE Is Beyond Commerce Clause Authority under *United States v. Lopez*; Is Not Authorized by §5 of the Fourteenth Amendment; and Constitutes an Unauthorized Incursion upon Federalism and the Federal Judiciary

A. There Is No Constitutional Authority for a Federal Statute Punishing Local Obstruction of Abortion Clinics

Before both tribunals Petitioners maintained that Congress lacks authority under the Commerce Clause, § 5 of the Fourteenth Amendment and the Tenth Amendment to enact

FACE. The Fourth Circuit and the District Court paid little heed to these arguments, made no real analysis of the failed congressional attempt to color FACE constitutional in interstate commerce terms and simply accepted the Government's claims under a rubric that, in the Circuit Court's words, "We conclude that the commerce power permits Congress to regulate activities affecting reproductive health services." App. at 1a-2a. This was beyond legislative power because it displaced state and local criminal statutes and ordinances designed to regulate the same conduct without any meaningful showing that interstate commerce was involved.

In *United States v. Lopez*, #93-1260, (April 26, 1995),[1] the Court had before it the Gun-Free School Zones Act of 1990, which forbids "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone," 18 U.S.C. § 922(q)(1)(A). The Court took the opportunity to define more precisely the limits of Commerce Clause power.

There are "three broad categories . . .that Congress may regulate under its commerce power." *Slip op.* at 9.

> First , Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate

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1

In both the Fourth Circuit and the District Court Petitioners relied upon the Fifth Circuit decision to reverse the *Lopez* conviction under the Gun-Free School Zones Act because the Act was beyond Congress' power under the Commerce Clause. 2 F.3d 1342 (5th Cir. 1993). This Court's April 26, 1995 *Lopez* decision was rendered after issuance of the Fourth Circuit mandate herein on April 7, 1995.

> commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce. . . .
> *Slip op.* at 9-10.

The first two categories did not encompass the Gun-Free statute. The Court held as to the third category -- "those activities that substantially affect interstate commerce" -- that § 922(q) had nothing to do with interstate commerce. The statute is criminal and "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* § 992(q) also "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* Although the Court will consider legislative findings when evaluating a statute in commerce terms, it observes that Congress is not required to make such findings.

The Court concludes that it will not "pile inference upon inference" and "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* The Court is unwilling to acquiesce in the obliteration of "what is truly national and what is truly local" in the Commerce Clause. *Id.*

FACE, too, fails to reflect any *substantial* affect on interstate commerce. In *Lopez* this Court drew a line beyond which it said Congress could not go to enact legislation that supposedly deals with practices which impact interstate

commerce. As egregiously as in *Lopez,* Congress pushed federalism aside and enacted FACE to make it a federal crime to obstruct or interfere with, violently or peaceably, reproductive health facilities in every locality in the nation.

To buttress the shaky constitutional basis for FACE, its Senate proponents temporarily inserted findings designed to masquerade the proscribed conduct as interstate commerce. They recited that abortion providers buy products in interstate commerce and that the activities of abortion-protesters may restrict such commerce. S. 636, 103d Congress, 1st Session, 139 Cong. Rec. S15655 (Daily ed., November 16, 1993). These boilerplate provisions offer no indication, however, that the protestors have the required "substantial" affect upon interstate commerce, or that such commercial affect, if any, was among the real legislative purposes of FACE. FACE as enacted *omits* the findings, while substituting an anemic and conclusory reference to interstate commerce, in an expansive and nonspecific "Purpose" clause. 18 U.S.C. § 248, setting out §2, Pub. L. 103-259.

To support FACE Congress may have relied upon four considerations. Congress evidently considered, for instance, that abortion clinics operate in interstate commerce. By that sweep who or what does not operate in interstate commerce? Every person and entity would be subject to minute federal regulation. Congressional supporters also claimed that people travel across state lines to clinics to procure abortions. Who does not cross state lines? If one considered only Washington Metropolitan Area residents, one would note that five Justices regularly cross state lines: if one stopped to pray near an abortion clinic, would he or she be drawn into interstate commerce, "substantially affect interstate commerce," have a "concrete tie to intrastate commerce" or engage in "an

economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce?" So neither would the pregnant mother, if any, who crosses a state line to procure an abortion.

By the reasoning supporting FACE, local disturbance around clinics lowers the number of abortions and therefore affects interstate commerce. By this standard any local action adverse to any business could be enjoined by federal statute because it could decrease demand for goods or services. It is asserted that clinic violence is a nationwide problem over which States have lost control. No basis for such advocacy is shown -- not surprising given the manifold state laws against violence and trespass. Yet a more basic question remains: does that mean that whenever Congress perceives a local problem occurring in many localities it may legislate to control the problem, regardless of lack of substantial connection with interstate commerce? *Lopez* requires otherwise.

In *United States v. Wilson*, #94-CR-140, *slip op.* (E.D. Wisc. March 16, 1995), LEXIS 3439, the District Court struck down the FACE provision that prohibits nonviolent physical obstruction of entrances to clinics.

Wilson seems anticipatory of *Lopez*, for it looks to FACE in Commerce and Fourteenth Amendment terms, finding no substantial connection with interstate commerce. *Wilson* is the only adjudicated FACE case to analyze the interstate commerce question in a serious way. All the other decisions have skipped that issue and reached the customary conclusion that the interstate commerce requirement had been met, whether in fact it had.

Petitioners twice have raised the interstate commerce

issue but have been ignored. The question is important, accentuated by *Lopez*. The Court should settle the matter, by enunciating standards by which Congress may legislate and the Judiciary may adjudicate.

Lopez struck down a statute that had no affect upon interstate commerce, any more than the activities of private local anti-abortion demonstrators have. Like FACE, the Gun-Free statute did not require a showing of particular connection to interstate commerce as an element of the federal crime it created. Nor did it contain explicit findings with respect to interstate commerce. This Court declined to assume that interstate commerce was affected in every case in which someone possessed a firearm within 1,000 feet of a school. Because neither an interstate commercial purpose nor a substantial economic effect upon interstate commerce had been shown, the statute fell. So, too, should FACE. It bears all the constitutional frailties of the Gun-Free law and puts the Government into strictly local law enforcement in a mockery of federalism.[2]

B. §5 of the Fourteenth Amendment Does Not Authorize Congress to Punish Private Anti-abortion Activities

§ 5 of the Fourteenth Amendment authorizes Congress to provide for penalties against some forms of private interference with the exercise of certain constitutional rights.

2

In no pleading, argument or opinion in the case below was there an effort to link the local activity of Petitioners herein to the affecting of interstate commerce, much less to the substantial affecting of interstate commerce or to a substantial economic activity.

Griffin v. Breckenridge, 403 U.S. 88 (1971). A fundamental restriction upon this power is that it must be directed at rights which the Constitution itself protects against private interference.

In *Carpenters v. Scott,* 463 U.S. 825 (1983), the Supreme Court considered the application of 42 U.S.C. § 1985(3), having its origin in the Civil Rights Act of 1871, to a private conspiracy aimed at preventing the exercise of First Amendment rights. The Court holds that § 1985(3) affords no cause of action against persons engaged in such a conspiracy, because the rights in question are not among those "protected against private, as well as official, encroachment." 463 U.S. at 833. In *Bray v. Alexandria Women's Health Clinic,* 113 S. Ct. 753 (1993), the Court applied the rule of *Carpenters* to an action under § 1985(3) against persons who had obstructed access to abortion clinics. Because the right to abortion, like other elements of the general right to privacy upon which it is based, is "obviously *not* protected against private infringement," there could be no cause of action under the civil rights law. *Id.* at 764. [Emphasis by the Court.]

Although the precise questions presented in *Bray* and *Carpenters* involve statutory interpretation, the limiting constructions are designed to avoid the "'*constitutional* shoals that would lie in the path of interpreting §1985(3) as a general federal tort law.'" *Bray*, 113 S. Ct. at 759, quoting *Griffin,* 403 U.S. at 102. [Emphasis supplied.] Thus, while enactment of FACE may have cured some *Bray* defects, it cannot cure the fundamental defect presented by the constitutional impossibility of a private violation of a right which the Constitution protects only against governmental infringement. "A burglar does not violate the Fourth Amendment, for example, nor does a mugger violate the Fourteenth." *Bray,* 113

S. Ct. at 764. Similarly, there can be no federal protection against private conspiracies to violate the constitutional right to abortion because "deprivation of that federal right (whatever its contours) *cannot* be the object of a purely private conspiracy." *Id.* [Emphasis supplied.] Therefore, although "[t]respassing upon private property is unlawful in all States, as is, in many States and localities, intentionally obstructing the entrance to private premises," *Id.* at 768, § 5 of the Fourteenth Amendment provides no more constitutional authority for a federal statute against anti-abortion trespassers or clinic obstructors than it does for a general federal law against burglary or mugging.

C. This Court Should Resist the FACE Legislative Incursion upon Federalism and the Federal Judiciary

The Founders' fear of majority legislative tyranny prompted insistence upon an independent Federal Judiciary. See J. Madison, A. Hamilton, J. Jay, *The Federalist*, #78. Many unpopular, even despicable, persons have found protection in federal courts. The federal courts once had the support of elite opinion -- particularly law journals -- in safeguarding the rights of minorities to speak and protest. In an age of political correctness, however, some are rethinking their commitment to "unrestricted" free speech. See C. Sunnstein, *Democracy and the Problem of Free Speech* (New York; The Free Press, 1993) ("We are in the midst of a dramatic period of new thought about the meaning of free speech in America", at ix). Limits which in the past would have been judged content- or viewpoint-based, with a slight lens adjustment, may survive scrutiny.

Federal restraint upon free speech has been relatively rare. The overwhelming majority of cases striking down

statutes and ordinances under the First Amendment have come from state law. Areas of criminal law once deemed to be exclusively within the province of states have been federalized. See J. Baker, "Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?" 16 Rutgers L.J. 495 (1985). Federalization of crime has been occurring because the normal checks and balances within Congress do not seem to operate where crime is concerned. Congress greatly has expanded federal criminal jurisdiction -- which should be cause for alarm within the Federal Judiciary.

Although Congress no longer may question its authority to federalize crime, the Judiciary must. *The issue is not merely whether Congress has power to intrude upon the States but also how far it has power to intrude upon the federal courts.* While threats to the Judiciary from Congress generally have been viewed in terms of removing jurisdiction, Congress in fact rarely removes jurisdiction. See Baucus and Kay, "The Court Stripping Bills: Their Impact on the Constitution, the Courts and Congress," 27 Vill L.R. 988 (1982). The trend has been the opposite. As the Chief Justice warned recently, the trend threatens to engulf the federal courts. ("I urge Congress to review carefully the impact on the federal courts, and on the traditional balance between state and federal jurisdiction, before adopting the more expansive proposals in the crime bill.") *1993 Year-End Report on the Federal Judiciary.* The Judiciary is not just another subservient agency available to do whatever Congress wishes.

Unless FACE is struck down, the federal courts must accept jurisdiction over a class of criminal cases which in common-law terms need not rise even to the level of a trespass upon property or an assault (understood as less than a battery) upon a person. In analyzing the individual issues, this Court

should consider the arguments within this jurisdictional context. When deferring to congressional intent, federal courts do so as a matter of respect for the principle of separation of powers. That same principle also requires the Judiciary to resist congressional overreaching to confer undue jurisdiction.

FACE involves not only the inadequacy of congressional definition but its very legitimacy. However broadly one might stretch the Commerce Clause in civil matters, its application to criminal matters implicates jurisdictional principles not applicable to civil matters. As *Marbury v Madison*, 1 Cr. (5 U.S.) 137 (1803), reminds us, the most basic use of judicial review has been defensive. Chief Justice Marshall therefore refused to exercise jurisdiction given by Congress, but not by the Constitution. If the jurisdictional dimension of FACE is ignored, the Judiciary may render its institutional integrity defenseless against a flood of federal criminal laws, including domestic violence,[3] drunken driving, assault and trespass, which belong in state court.

II. The Court of Appeals Otherwise Errs

A. The Court of Appeals First Amendment Standard of Review Is Erroneous

The Fourth Circuit uncritically concluded that strict

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[3] E.g., see the proposed "Violence Against Women Act," introduced in the 103d Congress, as part of a federal crime bill, discussed in "A Million Mrs. Bobbitts", *The New York Times*, A26 (January 28, 1994). Abuse of children and female spouses, e.g., is a grievous problem, as to the gravity of which, unlike abortion, there is no serious disagreement. Is domestic relations law to be federalized?

scrutiny is not the standard to apply to FACE. Instead, the Court invoked an intermediate test to determine constitutional validity, based partly upon its determination that the restricted conduct was outside protected speech in many respects. But FACE, according to the Court, did not escape the First Amendment entirely, for it does affect some protected conduct like peaceful protest that obstructs entrances.

The Fourth Circuit determined that FACE is content- and viewpoint-neutral, thus requiring a First Amendment neutrality enquiry that does not focus upon the motive of the protester. "Rather, a statute regulating expressive conduct is neutral if it is justified without reference to the content of the violator's message or point of view. *Madsen v. Women's Health Center*, 114 S. Ct. 2516, 1523-24 (1994); *Ward v. Rock Against Racism*, 491 U.S. 788, 791 (1989). Congressional purpose is the main consideration. *Id.*" App. at 9a-10a. Finally, the Court finds that the Congress chose reasonable regulatory means adapted to legitimate objectives --- namely, stopping violence around abortion clinics.

B. FACE Legislative History Clearly Establishes Applicability Only to Prolife Advocates

At first blush much of FACE seems unambiguous. As its "Purpose", §2, states, Congress is establishing penalties and remedies for conduct intended to injure, intimidate or interfere with persons seeking or providing reproductive services. To understand congressional intent, however, one must scrutinize the language of §248(a)(1) and the legislative history, particularly the word "because." Then it becomes clear: only those who espouse prolife views are targeted.

FACE is written in terms general enough to appear to criminalize First Amendment activities of disparate groups and individuals around abortion clinics. The Fourth Circuit, however, ignored venerable construction standards. The Supreme Court has a long-established way of construing statutes. In *United States v. Turkette*, 452 U.S. 576, 580 (1981), for instance, the Court states that a court should look first at the language. If there is no ambiguity, "in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'"

In *INS v. Vardoza-Fonseca,* 480 U.S. 421, 432 n. 12 (1987), the Court added:

> "...clearly expressed legislative intention" contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses.

FACE is designed to suppress only the anti-abortion side of a fierce national debate. The legislative history reveals intent that only those who espouse anti-abortion views are at risk.[4] The Fourth Circuit ignored such intent. This failure

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[4] A Department of Justice press release, dated April 11, 1995, received by Counsel May 9, reports the first FACE indictment of a pro-abortion individual. Defendant is said to have been indicted for telephoning two abortion-alternative counseling facilities and threatening in one call "to kill workers at the clinic" and in the other "to shoot prolifer supporters demonstrating outside abortion clinics." The indictment is said to be in two counts: (1) unlawful interstate communication -- obviously not FACE; (2) FACE -- "threat of force to intimidate and interfere with ... workers." The press release does not discuss the fact that FACE legislative history deals solely with activity involving abortion facilities (euphemistically rephrased,

establishes a precedent for spawning innumerable criminal, civil and injunctive FACE actions - all in federal court.

C. FACE Abridges the Freedom of Expression Protected by the First Amendment

1. A Content-specific Statutory Regulation of Expressive Conduct Is Presumptively Unconstitutional and Must Be Subjected to the Most Exacting Scrutiny

Petitioners had urged application of the strict scrutiny articulated in *R.A.V. v. St. Paul,* 112 S. Ct. 2538 (1992), *Boos v. Barry*, 485 U.S. 312 (1988), and other cases involving prohibitions of expressive conduct by reference to the content of the expression. Instead the Circuit Court applied intermediate scrutiny, primarily relying upon *Madsen, supra.*

Madsen concerns a state court injunction against various forms of speech and expressive conduct by prolife protestors in the vicinity of an abortion clinic. In upholding some parts of the injunction and invalidating others, the Court applied a newly unfolded intermediate standard of review, stricter than the standard applicable to a content-neutral restriction of time, place and manner, but not as strict as the standard applicable to a content-specific statute. Although the injunction effectively restricted only prolife expression, the Court rejected the argument that it should be subjected to the rigorous scrutiny appropriate to content-specific statutes

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during the legislative process, as "reproductive health services").

because to apply the statutory test in the injunctive context would make nearly every injunction content- or viewpoint-based. *Id.* at 6.

The scrutiny with respect to statutes which regulate expression by reference to the content of the expression or to the viewpoint expressed is settled beyond serious dispute: an exacting scrutiny. *Boos v. Barry*, 485 U.S. 312 (1988).

FACE, a statute and not an injunction, should not be evaluated by the *Madsen* somewhat unclear intermediate standard. Rather, because it explicitly regulates expressive conduct by reference to content, and implicitly by reference to viewpoint, it must be subjected to the "exacting scrutiny" of *R.A.V.*.and *Boos*, *supra*.

2. FACE Imposes Content-based Restrictions upon Political Expression

Aside from its direct prohibition of certain forms of political expression protected by the First Amendment, FACE clearly is unconstitutional as both a content- and viewpoint-based restriction on political expression.

FACE would be unconstitutional as a content-based restriction even if each expressive act it punishes were deemed outside First Amendment protection because FACE restricts such acts when they are committed "because" of the provision of "reproductive health services" but permits the same acts when committed for other reasons. § 248 (a)(1), (a)(3). People who wish to obstruct access to businesses, schools and hospitals, for any reason or none, may do so with impunity under federal law. The protection of the statute is triggered

only when the target of the obstruction or other prohibited conduct is a provider of "reproductive health services" and the conduct is "because" of such "services."

The actual intent required in FACE, however, is *not* the intent to injure, intimidate or interfere with any person *"who is"* obtaining or providing abortion or other reproductive health services. Rather, the required intent is the intent to injure, intimidate or interfere with any person *"because* that person is obtaining" or providing such services. §248 3(a)(1). [Emphasis supplied.]

Because FACE is content-specific,[5] it is unconstitutional in the absence of a compelling distinction between obstruction and interference by persons objecting to "reproductive health services" and identical obstructions and interferences by environmentalists, labor picketers and others. No such distinction has been advanced, and the "presumption is . . . very strong" that none would bear scrutiny. *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2047 (1994) (O'Connor, J., concurring).

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See also Senate Committee Report # 103-117, 103d Congress, 1st Session, at 24 (submitted by Senator Kennedy):

> Thus, for example, if an environmental group blocked passage to a hospital where abortions are performed, but did so as part of a demonstration over harmful emissions produced by the facility, the demonstrators would not violate this Act. . . . [T]he demonstrators' motive is related to the facility's emissions policy and practices and not to its policy and practices on abortion-related services.

3. FACE Imposes Viewpoint-based Restrictions upon Political Expression

FACE explicitly establishes a content-based restriction upon "obstruction" and similar activities but this is not all. Both its principal purpose and its principal effect are to enact a de facto *viewpoint*-based restriction targeted at anti-abortion protests. This purpose, only implicit in the text, is clear from the context of final enactment and is explicit and pervasive in the legislative history.

Nor should the last-minute legislative substitution of the term "reproductive health services" for "abortion-related services" be regarded as dispositive of the question of viewpoint discrimination. If a political faction, upon obtaining a legislative majority, may effect an otherwise impermissible suppression of the expressive conduct of a particular group of its ideological opponents simply by stretching the list of prohibited viewpoints --- in this case the "because" clause of §248(a)(1) --- so as to encompass one or two hypothetical situations in which somebody other than the targeted group conceivably might be subject to similar suppression, then there is not much left of the prohibition against viewpoint specificity.

FACE is constitutionally indistinguishable from the statute struck down in *R.A.V.*. FACE also contains the objectionable elements of any number of hypothetical statutes which, were they enacted outside the context of the abortion controversy, would be regarded as transparent attempts to suppress particular viewpoints. The FACE formula is designed clearly to help one side in the abortion debate and hurt the other. A statute that does this by punishing expressive conduct, and which limits punishment to conduct which is engaged in

"because" of an event which in the overwhelming majority of actual cases is desired by one side in the debate and opposed by the other, is viewpoint-specific.

FACE makes an impermissible distinction between expressive conduct engaged in by anti-abortion protesters and identical conduct designed to prevent or dissuade people from exercising other constitutional rights. One may obstruct access to public auditoriums, newspapers or the headquarters of right-to-life organizations without falling afoul of FACE. Only "reproductive health services" and the opponents of certain services are singled out.

This Congress may not do. As the Supreme Court observed of the "hate speech" ordinance struck down in *R.A.V.*, the legislature "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules." 112 S. Ct. at 2548.

4. FACE Imposes Severe Penalties upon First Amendment Expression

Even if it were not content-based and viewpoint-based, FACE would be unconstitutional because it imposes penalties upon various forms of nonviolent political expression. Although some forms of expression arguably are outside First Amendment protection, others are squarely within that scope.

FACE subjects a person who "interferes with or attempts to . . . interfere with" another person who is or has been obtaining or providing abortion-related services when the offender's conduct is "exclusively a nonviolent physical obstruction" to a fine up to $10,000 and imprisonment up to six months, for the first offense; 18 months and $25,000 for a

subsequent offense.

The congressional debate on FACE is replete with explicit references to the psychological and emotional "injuries" that may be caused by listening to a message one does not want to hear. See, e.g., 139 Cong. Rec. S15671 (Daily ed, November 16, 1993) (statement of Senator Feinstein).

Finally, FACE prohibits particular forms of symbolic speech that are uniquely powerful in the context of the abortion debate. It does so, moreover, in a context that suggests that the prohibition is at least partly *because* of this expressive content.

Punishment of nonviolent political expression strikes at the very heart of the First Amendment. When, as here, the punishment is at least in part *because* of the communicative nature of the conduct, the law in question must be subjected to "the most exacting scrutiny." *Texas v. Johnson,* 491 U.S. 397, 412 (1989), quoting *Boos,* 485 U.S. at 321. See also *United States v. O'Brien,* 391 U.S. 367 (1968).

5. FACE Is Substantially Overbroad and Unconstitutionally Vague

The terms "vagueness" and "overbreadth" are used to describe several distinct sorts of constitutional defect. Some of the constitutional commands that can be transgressed by a vague and/or overbroad statute regulating expression are grounded in the fair notice requirement of the Due Process Clause of the Fifth Amendment. Others are inherent in the First Amendment protection of freedom of expression. See generally Fallon, *Making Sense of Overbreadth,* 100 Yale L.J. 853 (1991). FACE contains several of these defects.

To the extent FACE defines conduct which is the legitimate object of regulation, it does so "by means that sweep unnecessarily broadly and thereby invade the area of protected freedoms." *N.A.A.C.P. v. Alabama,* 377 U.S. 288, 307 (1964).

The blanket criminalization of verbal "threats" also appears to be overbroad. The Supreme Court repeatedly has held that threats in the context of a political dispute may be punished only when they are "directed to inciting or producing imminent lawless action, and [are] likely to incite or produce such action." *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969); see also *Claiborne,* 458 U.S. at 927. Cf. *Wurtz v. Risley,* 719 F. 2d 1438 (9th Cir., 1983) (statute proscribing "intimidation," defined to include "a threat to . . . commit any criminal offense," was overbroad).

FACE has an impermissible chilling effect. A straightforward reading of key provisions reveals that they may be violated by the very things prolife protestors and counsellors try to do every day on the streets and sidewalks outside clinics. And, if narrowed, FACE yet would be unconstitutionally vague.

6. FACE Impermissibly Requires Payment of Damages for Commercial Injuries Caused in Whole or in Part by First Amendment Expression

Even if FACE did not directly punish protected expression or discriminate against expression on the basis of content and viewpoint, and even were it not vague and overbroad, its statutory damages provision would fail. This provision not only allows for the recovery of damages by abortion providers against peaceful prolife demonstrators who

may have stepped outside the bounds of constitutional protection; it specifically provides that the abortion providers may recover such damages *without* proving that they were incurred on account of the demonstrators' constitutionally unprotected conduct. § 248(c)(1)(B).

Claiborne holds that where damages may have been caused by a course of conduct which included both expressive conduct protected by the First Amendment and unprotected conduct such as violence and threats of violence, damages may be assessed (1) only against defendants shown to (i) have engaged in unprotected conduct or (ii) specifically intended to further the illegal aims of such conduct; and (2) *only* in an amount sufficient to compensate for the injuries shown to have been caused by the unprotected conduct. 458 U.S. at 916-920. Moreover, proof of the amount of damages attributable to the unprotected conduct must be with "precision." *Id.* at 916.

Indeed, FACE goes even further than the Mississippi law struck down in *Claiborne.* Not only does the clinic owner not have to prove with "precision" how much of his damages were caused by the unprotected acts rather than by his opponents' exercise of their right to free speech, he can recover the $60,000 even if it is proved affirmatively that the entire economic injury was attributable to the constitutionally protected activity! For instance, the owner could still opt to receive the $60,000 "at any time prior to the rendering of final judgment" even if every woman who had canceled her abortion appointment on the day of the demonstration testified at trial that she had changed her mind because she was impressed by the demonstrators' sincerity and the force of their arguments, not because of physical obstruction.

D. FACE Violates the Free Exercise

Clause and the Religious Act By Targeting Religious Beliefs and Practices

1. FACE Violates Appellants' Rights under the Free Exercise Clause

The conflict between abortion rights groups and prolife religious groups is bitter because it arises from a dispute about the most fundamental question of life. Although abortion advocates may be free to secure the enactment of their own views into law without violating the Establishment Clause, their attempt through FACE to suppress the religiously motivated expression and conduct of their opponents does violate the Free Exercise Clause. As the Supreme Court recently observed, a free exercise claim may present itself "upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices." *Church of Lukumi Babalou Aye v Hialeah,* 113 S. Ct. 2217, 2234 (1993).

The law need not explicitly target religious beliefs to violate the Free Exercise Clause. Rather, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral..." *Id.* The text alone is not controlling. In *Lukumi,* the Court "reject[s] the contention. . . .that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative." *Id.*.

The motive requirement has the effect of exempting other similar but politically acceptable acts, as is revealed in the legislative history which distinguishes and exempts environmental protestors who may block hospital entrances.

In *Lukumi,* the targeted conduct is a religious ritual. The Free Exercise Clause is not limited to protection of religious ritual. Rather, *Lukumi* repeatedly uses the term "religious practice."

"A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." 113 S. Ct. at 2233. FACE is subject to strict scrutiny if it fails on either count: neutrality or general applicability. It fails on both counts. As in most strict-scrutiny cases, Appellee cannot establish a compelling reason to justify this particularly worded law.

2. FACE Violates the Religious Act

Quite apart from the neutrality and general applicability requirements of the Free Exercise Clause, FACE violates the Religious Act, 42 U.S.C. §§2000bb, *et seq*, which affords Appellants even greater protection than would be afforded by the Court's constitutional holdings. Dissatisfied with *Employment Division v. Smith,* 494 U.S. 872 (1990), Congress has "provide[d] a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. §2000bb(b)(2). The Religious Act applies even to neutral laws of general applicability. *See* §2000bb(a)(1), Findings.

The Religious Act provides protection to the free exercise of religion broader than the Constitution requires. The statute prescribes that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided . . ." 42 U.S.C. § 2000bb-1(a). As demonstrated in the previous section, FACE does substantially burden Appellants' exercise

of religion by threatening them with arrest, prosecution and punitive damages for engaging in religious acts of mercy.

An exception to the Religious Act allows imposititon of a substantial burden "only [upon demonstration] that the application of the burden to the person - 1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* at §2000bb-1(b). Thus, the Religious Act also goes further than the Constitution in that a compelling governmental interest is not sufficient. The Government must demonstrate that it has used the least restrictive means.

III. The Questions Presented Are Important

FACE has triggered seventeen additional cases. Media reports suggest others. This and one other currently seek certiorari.[6] Upon information and belief, others are in the appellate process. Over time, notwithstanding the widespread FACE-induced free speech/religious rights chill, there

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The other is *Woodall v. Reno*, 47 F.3d 656 (4th Cir. 1995); argued following the instant case; subject of a two-page opinion referring to the instant case for its rationale. No Commerce Clause/federalism issue is raised in *Woodall*. Appellants there filed for certiorari under date of February 21, 1995, claiming to be "the first Court of Appeals decision on FACE . . ." Petition for Writ of Certiorari, #94-1417, page 1. In fact, the instant case is the first FACE case filed; the first to receive a full trial court opinion; the first argued and adjudicated upon appeal; the first and only to receive a full appellate opinion; and the first to be dismissed upon all counts with prejudice. The *Woodall* Answer of the Solicitor General is due on or about June 1, 1995. *Woodall* and the case at bar are materially different. Only Petitioners herein raise the Commerce Clause/federalism issue. Only Petitioners are fully dismissed with prejudice.

undoubtedly will be a widening flow of FACE criminal, civil and injunctive cases, eventually inundating state and local police power. Until and unless this honorable Court enunciates the constitutional criteria applicable to FACE, and, if need be, the standard of scrutiny, while untold law-abiding citizens will refrain from speech perceived to be unlawful, many others will follow their faith and hope; and the Federal Judiciary will become the police courts of local America.

CONCLUSION

For the foregoing reasons, Petitioners American Life League, Inc. And the individual Petitioners pray that their Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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